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Reasonable restrictions upon freedom...

New York

1915

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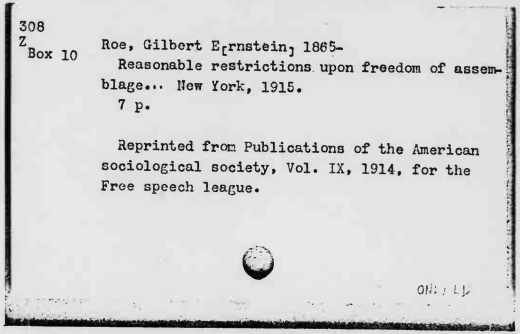

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REASONABLE RESTRICTIONS UPON FREEDOM OF ASSEMBLAGE

Discussion by
GILBERT E. ROE
Of the New York Bar

Reprinted from PUBLICATIONS OF THE AMERICAN SOCIOLOGICAL SOCIETY
Volume IX, 1914, for the FREE SPEECH LEAGUE
56 East 59th St., New York City
1915

The Free Speech League

AT ALBANY, New York, on April 7, 1911, the Free Speech League was incorporated. The incorporators are: President, Leonard D. Abbott, associate editor of *Current Literature;* Vice-president, Brand Whitlock, mayor of Toledo, Ohio; Lincoln Steffens, leading progressive economist; Bolton Hall, author and lawyer; Gilbert E. Roe, law-writer; Treasurer, Dr. E. B. Foote, author of medical books; Secretary, Theodore Schroeder, author and lawyer. In the articles of incorporation the purposes of the Free Speech League are declared to be:

"The principal objects for which said corporation is formed are as follows, viz.: By all lawful means to promote such judicial construction of the Constitution of the United States, and of the several states, and of the statutes passed in conformity therewith, as will secure to every person the greatest liberty consistent with the equal liberty of all others, and especially to preclude the punishment of any mere psychological offense; and, to that end, by all lawful means to oppose every form of governmental censorship over any method for the expression, communication, or transmission of ideas, whether by use of previous inhibition or subsequent punishment; and to promote such legislative enactments and constitutional amendments, state and national, as will secure these ends." The officers are all unsalaried. If you are interested send a contribution to

THE FREE SPEECH LEAGUE
56 East 59th St., New York City

Hutchins Hapgood has succeeded the late Dr. E. B. Foote as a director.

FREEDOM OF ASSEMBLAGE

A DISCUSSION

BY
GILBERT E. ROE

Presented at the annual meeting of the American Sociological Society, December 29, 1915, at Princeton, New Jersey.

The preceding excellent addresses contain so much of interest and information, and constitute so valuable a contribution to the subject of the day's discussion, that I am loathe to suggest a dissent from any of the views expressed. It seems to me, however, that the first question to be settled is, What is the purpose of our present discussion? Do we wish to find out how certain persons who have the habit of saying unpleasant things on inopportune occasions can be handled with a minimum of friction, or do we wish to ascertain what right they have to express their opinions, even if those opinions are both unpopular and unpalatable? To show that tumultuous assemblages have been dealt with more easily by not using the policeman's club than by using it is a valuable service; but after all the important question is not, What is the best method of preserving order on such occasions? But the real inquiry is, or should be, What is the limit of right on the part of the assemblage, and what is the point at which the police authorities may rightfully and legally interfere? If it is merely a question of what is expedient, the answer will vary as the personnel of the officers charged with the enforcement of law varies. One police chief will direct the use of the club, and another will not. One will rely upon intimidation and force to prevent or disperse a meeting. Another will wait until life or property is actually in jeopardy. The very differences in the rules applied bring the administration of the law, and the law itself, into disrepute, and thereby beget the very evils which it is sought to remedy. Then, too, if those charged with the duty of enforcing the law have sympathy with the purpose of the particular agitation which calls the assemblage together, a very lenient view will be taken of acts which other officials would sternly suppress. I shall spend no time discussing the right of anyone to use the portion of the highway needed for traffic for the purpose of speech-making, nor the right of one to air his own views by invading the meetings of others.

Professor Brooks in his most admirable address has just said: "Both facts and legal provisions should be widely distributed on the first indication of trouble. Local trade unions, Socialists, and kindred bodies should know what the law is." I watched Professor Brooks closely at this point in his address to see whether or not there was any trace of humor in this suggestion, but, as far as I could observe, he was perfectly serious. Now it is of the highest

INTENTIONAL SECOND EXPOSURE

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importance that local trade unions, Socialists, and kindred bodies should know what the law is. But unfortunately they cannot know what the law is, and there is no one to tell them what the law is, because there is no one who knows what it is. Here is the real source of all the trouble. The lawyers do not know what the law is on the subject of free assembly and free speech—and free assembly and free speech must be considered together. The judges do not know what the law is on the subject. Under these circumstances even a Socialist may be pardoned if he is sometimes slightly confused about the question. But the case is even worse than I have stated it. Not only does no one know what the law is, but no one at the present time can find out what it is until after he has violated it. By that I mean precisely this: The old common law has been so far modified by the statutes of the various states that it is no longer a safe guide on the subject, while the statutes in many instances have not only undertaken to penalize acts which from the beginning of time were supposed to be innocent, but have done so in words of such general meaning that no one can tell whether a given act is or is not prohibited. The result is that it is left to the judge or the jury to guess at the guilt or innocence of the defendant, and since judges and jurors are always human, the verdict or judgment is almost certain to be determined according to their own opinions of the character of the act involved. Professor Brooks, in speaking of the decision of Judge Minturn which he quoted, said that the judge let the defendants go, meaning that he found them not guilty. The form of expression used clearly indicates the idea which is far too prevalent, that it is the judge and not the law which must be appealed to, to determine the guilt or innocence of a defendant.

The Chinese penal code provides, or at least did until recently, as follows: "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished by at least forty blows; and when the impropriety is of a serious nature, with eighty blows."

We smile at this provision of the Chinese law, but it is as definite and certain, and furnishes as certain a rule by which the individual can determine his conduct, as does our own law on the subject of "freedom of assembly," and "freedom of speech." I purposely refer to freedom of assembly and freedom of speech together, because any consideration of one leads immediately into the realm of the other. Freedom of assembly is important chiefly as an opportunity to exercise freedom of speech. If the right to either is denied, both are practically destroyed.

Illustrations drawn from a few cases that have come under my immediate observation will, I hope, serve to make clear my meaning. During the year 1913, the city of Paterson, New Jersey, was convulsed by a strike of mill workers. As always in such cases, feeling ran high on both sides. In the summer and fall of that year, over three hundred arrests were made, the defendants being charged with unlawful assembly. Many convictions on that

charge were obtained in the recorder's court in the city of Paterson. In the cases of fifty or more defendants thus convicted, sentence was suspended so that there was no occasion to take the cases further. In the case of William D. Haywood and others who were supposed to be leaders of the striking mill workers, severe penalties were imposed with the result that their cases were taken to the Supreme Court of the state, on habeas corpus. In all cases thus taken to the Supreme Court the defendants were discharged. The opinion of Judge Minturn referred to by one of the previous speakers was delivered in those cases and will be found reported in the *New Jersey Law Journal* of May, 1913, Vol. XXXVI, p. 146. The significance of the proceeding by habeas corpus in these cases lies in the fact that, in order to discharge the defendants in such proceedings, it was necessary for the Court to hold, and it did hold, that there was no evidence whatsoever tending to show the defendants guilty of the crime charged. Yet hundreds of men and women had been arrested and held for days upon the same evidence or lack of evidence, and upon the same charge, many had been convicted, and the strikers properly intimidated by the authorities, all without even the color of right or legal proceeding. What was done in the case of the Paterson strike has been duplicated at every other point where labor troubles have occurred in recent years. Who can measure the animosities thus engendered, the contempt for law and its processes thus begotten? And all because those charged with the administration of the law did not know what the law was. It is to be regretted that Judge Minturn's opinion is only the opinion of one judge, and we hope, though we cannot be certain, that had the question been presented to the highest court of the state, Judge Minturn's opinion would have been adopted as the law of that commonwealth.

In October, 1909, Emma Goldman desired to give a series of lectures in the city of Philadelphia, and engaged the Odd Fellows' Hall in that city for such purpose. The police of the city, by force, prevented her from entering the hall to deliver the first of the series of lectures, and also by force prevented the audience from gathering in the hall. This case is reported under the title of *Goldman* v. *Reyburn et al., Pennsylvania District Reports*, Vol. XXVIII, p. 883. In this situation Miss Goldman applied to the courts for redress. In the opinion it is said that the police justified their forceful exclusion of the plaintiff from the hall (I quote from the opinion)—

> on the ground that the delivery of the contemplated lecture would, in the judgment of the defendants [the police] have resulted in a serious breach of the peace, because of the character of the sentiments and ideas which the plaintiff intended to utter and urge upon audiences which might have gathered for the purpose of hearing her.

After stating that plaintiff based her claim of right to deliver her lectures upon the provisions both of the constitution of the state of Pennsylvania and of the United States, the Court says:

> If such public officers [policemen] should attempt to interfere in such case, their interference would be justified . . . . by the knowledge that dangerous and disturbing

sentiments, tending to disturb the peace, would be uttered. . . . . The plaintiff is an avowed anarchist. However honest or able she may be, she does not hesitate to declare that, in her belief, all government should be abolished and that every citizen should regulate his or her own conduct according to his own views of what is right and wrong, and that force may be resorted to for the purpose of destroying government and establishing the right of individual independence from governmental control. . . . . That the utterance of such views in the community would be likely to incite such feelings and antagonism as would result in a breach of the peace is by no means unlikely. It is not unreasonable to hold that such speech is an abuse of the liberty to speak freely upon any subject.

It will be noted that the learned justice is here anticipating trouble, not because the speaker's alleged anarchistic sentiments are expected to be accepted and put into operation by the audience, but because it was expected that they would be rejected so vigorously that a breach of the peace might result. Truly the lot of the professional lecturer is a hard one under this decision. Care must be used to excite neither an extreme of enthusiasm nor one of antagonism, for if the police but suspect the lecturer of the intent to do either, they may evict him from the hall and disperse his audience. This decision advances another interesting proposition. I quote from p. 885 of the report:

> It is a familiar principle of equity that plaintiffs cannot ask relief if they do not come into court with hands that are clean. We cannot avoid reaching the conclusion that one who openly and in advance announces the purpose of advocating such doctrines and sentiments as the plaintiff avows is not within the class that can claim protection and relief from a court of equity.

And then just to show that freedom of speech and assembly has not been violated, the opinion adds:

> In what we have said we do not regard ourselves as in any sense ignoring or limiting that right of free speech which the Constitution was intended to give and protect. That right is one too sacred and fundamental to be lightly regarded or readily waived or withheld. It is, however, a right necessarily subject to limitation and restriction, arising out of its abuse in an effort to make use of it for the destruction of government or persons.

Permit me the citation of one further authority which, while it does not directly involve freedom of assembly, does involve freedom of speech and of the press, and well illustrates the modern method by which these great elementary rights of liberty are being invaded or destroyed. I refer to the case of *State of Washington* v. *Fox*, 127 Pac. Rep. 1111 (November, 1912). The state of Washington a few years ago passed a statute (sec. 2564, Remington and Ballinger's Code) which, omitting certain immaterial provisions, provides:

> Every person who shall wilfully . . . . publish . . . . written or printed matter . . . . having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law, or of any court . . . . shall be guilty of a gross misdemeanor.

The defendant Fox was prosecuted under this statute for publishing a very mild criticism of the conduct of certain persons who had procured the arrest of certain other persons in the community who it was alleged had violated some regulation concerning nude bathing. In the opinion it is said: "It [the article] clearly upon its face incited . . . . disrespect of law relating to indecent exposure of the person," in nude bathing. If this statute is to stand, and the highest court of the state of Washington has upheld it, then any criticism of any law in that state can be punished as a gross misdemeanor. Any public meeting called to condemn any law may by that act alone be converted into an unlawful assemblage, since the act penalized by this statute is merely the arousing of that psychologic state characterized in the act as "disrespect for law." No one can possibly tell in advance what utterance is going to violate the law. The same argument which with some audiences would incite respect for the law would in others incite disrespect for it. Truly the Chinese statute previously quoted is a model of definiteness compared with this class of legislation.

I had supposed that it was fundamental in our criminal law that

> in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable [*Tozer* v. *United States*, 52 Fed. 917].

The usual definition or description of the common-law offense of unlawful assembly is that in order to constitute such offense there must be three or more persons assembled

> with intent to commit a crime by open force, with intent to carry out a common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighborhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it. If they take steps toward the performance of their purpose, it becomes a rout, and if they put their design into actual execution, it is a riot.

See *Cyc.*, Vol. XXXIX, p. 831, and cases cited; also *People* v. *Most*, 128 N.Y. 108; *Adamson* v. *City of New York*, 188 N.Y. 255; *State* v. *Russell*, 45 N.H. 83.

Nearly all the state statutes, as in the case of New York (sec. 2092, Penal Law), have greatly modified the common law, and it is sufficient if the necessary number of persons are assembled for any unlawful purpose, or, being assembled, threaten to do anything tending toward a breach of the peace, or any unlawful act whatever. When inciting disrespect for any law becomes itself unlawful, it is obvious that almost any public meeting called to discuss grievances may be converted into an unlawful assemblage.

The cases referred to are by no means exceptional. The list of similar cases decided in the last few years is very long. But this is not the time to review them and I content myself with a few additional citations. See *State*

v. *Waymire*, 97 Pac. Rep. 46 (Oregon Supreme Court); *Gallagher* v. *The People*, 71 N.E. Rep. 842 (Supreme Court of Illinois); *State* v. *Sinclair*, *New York Law Journal*, July 10, 1914 (General Sessions of New York City); *State* v. *Boyd*, 91 Atl. 586 (New Jersey Supreme Court). I know of no more important service this organization can perform than to investigate the state of the law on this subject and bring home to the public a knowledge of the doubtful and uncertain tenure by which we hold those rights we had believed to be absolute and inalienable.

One other point I wish to make is that, so far as can be judged from the decisions rendered, the courts cannot be depended upon to protect the fundamental rights of liberty against the assaults of unconstitutional legislation with the same zeal with which they have defended the rights of property from somewhat similar attacks. Wherever a statute has been passed invading property rights, as general and uncertain in its terms as those above referred to, the courts have been quick to refuse to enforce such statutes. For example, where statutes have been passed attempting to regulate railroads and railroad rates, and which prohibited the taking of "unjust and unreasonable compensation," or the making of "unjust and unreasonable discriminations," the courts have said that the statute was void, since the corporations and the persons against whom it was directed could do nothing under it with safety. See *Louisville, etc., Co.* v. *R.R. Comm.*, 19 Fed. 679; *Chicago, etc., R.R. Co.* v. *Dey*, 35 Fed. 866; *Tozer* v. *United States*, 52 Fed. 917. The fact is that in the instances above cited where freedom of speech and freedom of assembly have been denied, some unpopular person or unpopular cause has usually been the victim. In this matter the twentieth century will do well to learn of the eighteenth. I desire to quote the words of Lord Chatham in his memorable speech in the House of Lords, January 9, 1770. In his reply to Lord Mansfield on the amendment to the Address to the Throne, relating to the proceedings of the House of Commons in expelling John Wilkes therefrom, speaking of the duty of the courts to administer a definite law, and not judicial caprice, he said:

> What security would they [the people] have for their rights if once they admitted that a court of judicature might determine every question that came before it, not by any known, positive law, but by the vague, indeterminate, arbitrary rule of what the noble lord is pleased to call the *wisdom of the court?*

And again:

> For my own part I consider him [Wilkes] merely and indifferently as an English subject, possessed of certain rights which the laws have given him, and which the laws alone can take from him. I am neither moved by his private vices nor by his public merits. In *his* person, though he were the *worst* of men, I contend for the safety and security of the best, and God forbid, my lords, that there should be a power in this country of measuring the civil rights of the subject by his moral character, or by any other rule but the fixed laws of the land.

GILBERT E. ROE, NEW YORK CITY

In response to a question by a member, as to whether Thomas Jefferson ever upheld or counseled opposition to organized government, Mr. Roe read the following quotations from Jefferson, taken from Ford's edition of Jefferson's *Works*, Vol. V, pp. 44, 71. One is from a letter which Jefferson wrote to Madison in 1787, in which he said:

> I hold that a little rebellion now and then is a good thing and as necessary in the political world as a storm is in the physical. . . . . An observation of this truth should render honest republican governors so mild in their punishment of rebellions as not to discourage them too much. It is a medicine necessary for the sound health of government.

In a letter to Stephen Smith, November 13, 1792, Jefferson wrote:

> Can history produce an instance of rebellion so honorably conducted [referring to Shay's rebellion]? I say nothing of its motives; they were founded in ignorance, not wickedness. God forbid that we should ever be twenty years without such a rebellion. . . . . What country before ever existed a century without a rebellion and what countries can preserve their liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts; pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.

Let's make plain that the FREE SPEECH LEAGUE is not "for" blasphemy, "obscenity," libel, contempt of court, crime, or sedition; that we are not for anything wrong; but—that we sincerely believe in Free Speech, as the only sure way to get the right. In other words — absolute Liberty of Speech and the highest morality are inseparable. — LINCOLN STEFFENS.

JUDICIAL DEFINITION
OF
FREEDOM OF SPEECH

"To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all liberty, because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own. *It is time enough for the rightful purpose of civil government for its officers to interfere when principles break out into overt acts against peace and good order.*"

Virginia Legislature. Approved in *Reynolds* v. *U.S.*, 98 U.S. 163.

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